

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs-

Supreme Court No. 138577

ALEXANDER ACEVAL,
Defendant-Appellant.

Court of Appeals No. 279017
Wayne Circuit Court No. 05-3228

138577
**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION
TO APPLICATION FOR LEAVE TO APPEAL**

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COUNTERSTATEMENT OF JURISDICTION

The People accept Defendant's statement of jurisdiction.

COUNTERSTATEMENT OF QUESTIONS

- I. A defendant who pleads guilty waives all non-jurisdictional issues not preserved by a conditional plea. Here, Defendant tendered a voluntary and unconditional plea of guilty after retrial had commenced after a hung jury, following the prosecution's disclosure in open court that Defendant had been caught trying to arrange for a perjured alibi defense, when the prosecution offered a favorable plea agreement to resolve the matter. His present posturing notwithstanding, has Defendant shown any basis for overturning his guilty plea?**
- A. Did the trial court abuse its discretion by declining to entertain arguments by attorneys who had not filed a proper appearances?**
- B. Is dismissal of the underlying charges the appropriate remedy for trial errors by the police and prosecutor?**

Trial Court said: *No.*

Defendant says: *Yes.*

People say: *No.*

COUNTERSTATEMENT OF FACTS

The People reject Defendant's statement of facts as argumentative, biased, and unrelated to the question of whether this Court should intervene to set aside Defendant's guilty plea. In addition, Defendant's statement of facts is unencumbered by citations to the record of proceedings involving his June 7, 2006 plea of guilty. In its place, the People submit the following:

Following a mistrial caused by a hung jury in the fall of 2006, Defendant was scheduled for retrial in the early spring of 2007.¹ A co-defendant, Ricardo Pena, had been convicted and sentenced at the first trial, and Pena's conviction was pending on appeal.² During the course of the earlier proceedings, expressing concern for the welfare of one of the witnesses, the trial prosecutor and judge placed several matters on a series of separate records, revealing the inaccuracy of witness answers to several questions, including questions about previous contacts or dealings between the police and a prosecution witness.³ At the time, the trial prosecutor justified the inaccuracies due to a perceived risk of harm to one of the witnesses, Chad Povish, if he were identified in open court as the confidential informant.⁴ Nothing in the record, however, discloses the nature of any credible threat to witness Povish, and subsequent testimony established several prior dealings between Povish and the police.⁵ The records were sealed until after trial, and subsequently opened on March 30,

¹*People v Aceval*, Docket Entries.

²*People v Pena*, COA #266031.

³T, 9/8/05, 2-5; 9/19/05, 2-3.

⁴T, 9/8/05, 2-5; 9/19/05, 2-3.

⁵Undisclosed evidence from the police file also established Povish's likely financial reward in the event of a favorable verdict leading to civil forfeiture proceedings.

2006. Upon discovering the contents of the sealed record, the prosecution informed counsel for co-defendant Pena, and stipulated to a remand for purposes of a new trial.⁶

On March 17, 2006 and at subsequent proceedings, Defendant appeared with two attorneys for the purpose of arguing several pretrial motions. One, Warren E. Harris, had been retained to represent Defendant at trial; the other, David L. Moffitt, disavowed any intention to participate in the trial, and represented that he was appearing only for the limited purpose of arguing some of the motions and litigating any interlocutory appeals.⁷ Following the revelation of the substance of the matters discussed on the separate record and the disqualification of Judge Waterstone and reassignment of the case,⁸ on March 30, 2006, Judge Jones entered an order unsealing all of the previously sealed transcripts, and rescheduled trial for June 1st.

On May 19, 2006, the parties appeared for a pretrial hearing. The two attorneys for Defendant had each filed motions—Attorney Harris filing motions relating to the trial, Attorney Moffitt filing dismissal and other motions relating to the perjury-related issues discovered upon the opening of the sealed records. Attorney Harris, noting that Defendant had instructed him to defer his own motions pending decisions on those filed by Attorney Moffitt, moved to withdraw, citing conflicts between himself and Moffitt, and an ensuing breakdown in his attorney-client relationship with Defendant.⁹ The trial court, noting that Harris had filed the appearance in the matter, and that Moffitt's appearance purported to be limited to motions, declined to entertain those motions filed

⁶*People v Pena*, COA #266031, Confession of Error of May 24, 2006.

⁷M, 6/16/06, 3-4.

⁸M, 3/28/06, 24-26.

⁹M, 5/19/06, 4-6.

by Attorney Moffitt, or to reschedule the trial, and denied Harris' request to be relieved of further responsibility for the case.¹⁰

Retrial commenced in this matter on June 1, 2006. Among the new witnesses endorsed for the prosecution was Ricardo Pena, Defendant's co-defendant for the first trial. On June 7, 2006, the trial prosecutor informed the trial court and defense counsel that he had evidence that Defendant had contacted one of the prosecution witnesses in the case—Bryan Hill, who had been given immunity in exchange for truthful testimony—to arrange for the witness' perjured testimony on behalf of the defense.¹¹ Hill, upon being called to the witness stand, testified about telephone conversations he had had with Defendant over the Memorial Day holiday just before trial, in which Defendant told him the testimony that the witness should relate from the witness stand.¹² Hill then testified that he had lied on the witness stand as a result, but wanted to purge his testimony of the perjury.¹³ Following the courtroom revelation, Defendant decided to accept the prosecution's plea offer, and pleaded guilty.¹⁴

On June 29, 2006, the trial court sentenced Defendant to ten-to-fifteen years in prison, pursuant to the plea agreement.¹⁵ The case is presently before the Court as on leave granted, following a remand from the Michigan Supreme Court.¹⁶

¹⁰M, 5/19/06, 6-9.

¹¹P, 6/7/06, 4-7.

¹²P, 6/7/06, 10-15.

¹³P, 6/7/06, 15.

¹⁴P, 6/7/06, 16-29.

¹⁵P, 6/29/06, 8.

¹⁶MSC #135149, Remand Order of March 19, 2008.

ARGUMENT

I.

A DEFENDANT WHO PLEADS GUILTY WAIVES ALL NON-JURISDICTIONAL ISSUES NOT PRESERVED BY A CONDITIONAL PLEA. HERE, DEFENDANT TENDERED A VOLUNTARY AND UNCONDITIONAL PLEA OF GUILTY AFTER RETRIAL HAD COMMENCED AFTER A HUNG JURY, FOLLOWING THE PROSECUTION'S DISCLOSURE IN OPEN COURT THAT DEFENDANT HAD BEEN CAUGHT TRYING TO ARRANGE FOR A PERJURED ALIBI DEFENSE, WHEN THE PROSECUTION OFFERED A FAVORABLE PLEA AGREEMENT TO RESOLVE THE MATTER. HIS PRESENT POSTURING NOTWITHSTANDING, DEFENDANT HAS SHOWN NO BASIS FOR OVERTURNING HIS GUILTY PLEA.

Standard of Review

Though couched in incendiary terms, and raising a multitude of tangential issues, the principal questions raised in this application are those identified in this Court's order of remand: (1) did the trial court interfere with Defendant's choice of counsel at trial; and (2) whether retrial should be barred, given the presentation of perjured testimony at trial.¹⁷ Given Defendant's plea of guilty, however, there is also the threshold question of whether Defendant has presented a basis upon which to overturn his plea of guilty. Defendant's failure to comply with the court rules makes review of the points raised question improper under MCR 6.310(C)-(D), though this Court's previous order of remand requires at least a preliminary consideration of the legal questions contained in the earlier order. These first two issues, presenting questions of law, are before the Court de novo.

¹⁷As Defendant's third claim strikes the People as a restatement of his second, the response to both will be contained in Part B of this Argument.

Discussion

Proceeding from a faulty legal premise, Defendant reasons that because the police and prosecutor committed serious errors during his initial trial, retrial is barred. While such an unprecedented result might be necessary if the errors rendered a fair trial impossible, nothing in the law, logic, or common sense justifies such an extreme measure, and Defendant has offered this Court little beyond name-calling to justify his efforts to escape judgment for his criminal acts. For a variety of reasons, this Court should not indulge such posturing, and should reject his claims in toto.

A. The trial court did not abuse its discretion by declining to entertain arguments by attorneys who had not filed a proper appearance.

The People have no quarrel with the general notion that a defendant has the right to retain counsel of his choosing. The right to counsel is recognized by both state¹⁸ and federal¹⁹ constitutions, and state law has long recognized that Michigan's right to counsel is essentially coextensive with the Sixth Amendment.²⁰ While the right includes the right to appointed counsel for indigent criminal defendants,²¹ it also encompasses the right of the defendant to retain counsel of his own choosing, in most circumstances.²²

¹⁸Const 1963, Art I §20.

¹⁹US Const, Am VI.

²⁰See, eg, *People v Reichenbach*, 459 Mich 109, 118-120 (1998); *People v Marsack*, 231 Michy App 364, 372-373 (1998).

²¹*Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963).

²²See, eg, *Powell v Alabama*, 287 US 45, 53, 53 S Ct 55, 77 L Ed 158 (1932); *People v Portillo*, 241 Mich 540, 542 (2000).

The right to counsel is not, however, unlimited. The public's interests in the prompt and effective administration of justice imposes practical constraints on the assertion of the right to counsel, and a defendant may not seek to avoid justice by the expedient of securing an array of counsel. Rather, the Sixth Amendment carries only the presumption favoring a defendant's counsel of choice,²³ and other interests may affect the precise contours of its exercise in a given case. As this Court noted in *People v Kryzstopaniec*:²⁴

A balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated.

Thus, a defendant who is dilatory in retaining counsel is not entitled to an adjournment to retain a replacement,²⁵ and courts act within their discretion by adhering to court rules and schedules, in the absence of a manifest need for a continuance.

In this case, despite Defendant's attempt to portray the controversies at trial as one implicating the core values of the Sixth Amendment, it was a simple case of two attorneys wishing to take different approaches to the same case: Attorney Harris, intent upon preparing the case for the impending trial, had concluded that he could not in good conscience adopt the approach taken by Attorney Moffitt.²⁶ As we can see by the nature of Defendant's current argument in this Court, the two attorneys could not have collaborated on the case, since their approaches were radically different—and the tone and tenor of Defendant's current brief suggests both the nature and

²³See, *Wheat v United States*, 486 US 153, 164-165, 108 S Ct 1692, 100 L Ed 2d 140 (1988)(Opinions of Rehnquist and Marshall, JJ).

²⁴*People v Kryzstopaniec*, 170 Mich App 588, 598 (1988).

²⁵See, eg, *People v Gibbs*, 21 Mich App 137 (1970).

²⁶T, 5/19/06, 4-6.

intrusiveness of their professional difference of opinion. Accordingly, the trial judge was confronted with a dilemma: a case in which the most heated argument was not between opposing counsel, but between co-counsel for the Defendant, both of whom were retained. The court resolved the dilemma by noting that one attorney had filed an appearance as trial counsel, while the other attorney was seeking to intervene only for the purpose of raising the issue that was causing the disagreement—and, since she would entertain argument by only one attorney, she declined to permit the intervening attorney to intrude upon trial counsel’s conduct of the case.

The court did not, however, preclude further action by the Defendant: nothing in the court’s action prevented Attorney Moffitt from filing a substitution to replace Attorney Harris as the attorney of record. And nothing in the record suggests that the court did anything to interfere with the attorney-client relationship on either side of the defense table—with the caveat that the case was set for trial in a few weeks, and no intra-party squabbles were going to disrupt the court’s schedule. In this, the trial court exercised its discretion properly, by declining to become part of any disagreements arising at the defense table, and affording Defendant enough time to act, if he determined that he preferred to have Attorney Moffitt conduct his defense. That Defendant chose to let matters proceed, rather than changing attorneys, may be a source of ex post facto regret, but in no way violated the Sixth Amendment.

That this result follows as a matter of law and logic is clear—tellingly settled, ironically, by a case upon which Defendant relies. In *People v Fett*,²⁷ the Court of Appeals confronted a situation where the trial court had declined to allow an out-of-state attorney to appear in a felony drunk-driving case to represent the defendant. Reasoning that Michigan’s allowance of *pro hac vice* appearances was long-established, this Court reversed, finding that the trial court had arbitrarily

²⁷*People v Fett*, 257 Mich App 76 (2003) vac’d 469 Mich 913 (2003)

denied the defendant the right to retain counsel of her choice. On the prosecution's application, however, the Supreme Court reversed this Court's judgment, holding that there is no violation of the right to counsel "where the defendant is represented by her attorney of choice, but is denied a second attorney of choice."²⁸

In *Fetts*, the trial court denied the defendant's request for a second attorney because it concluded that the simple nature of the case made the second attorney unnecessary. Here, the trial court's reason was even more compelling: the two attorneys had diametrically opposed ideas on how to handle the case, and seemed unable to get along. Since both were retained—and since the second attorney²⁹ was unwilling to replace the first as trial counsel, the court settled their disagreement in the simplest, most effective way it could, by recognizing the attorney who had filed the appearance, thereby ending the squabble.

A different trial judge may, of course, have chosen a different course: the judge could have intruded herself into the particulars of the attorney-client relationship to discern which of the two attorneys Defendant preferred; she could have indulged Attorney Moffitt's fanciful and lengthy musings; or the judge could have acted as she did—proceeding with the attorney whose appearance was on record, while doing nothing to preclude Defendant (or Attorney Moffitt) from filing an substitution of attorney appearance to replace his initial choice of counsel. As the choice made was a reasoned resolution of the problem, choosing the latter course was hardly an abuse of discretion.³⁰

²⁸*People v Fett*, supra at 913.

²⁹I.e., Attorney Moffitt.

³⁰*People v Fett*, supra; see also, *People v Echavarria*, 233 Mich App 356, 368 (1999).

B. The remedy for errors by the police or the prosecutor occurring at trial is a new trial, and not dismissal of all charges.

Though buried amid pages of rhetoric, Defendant's principal claim on appeal is an effort to convert the mistakes and blunders of others into a means of insulating his own criminality from judgment. As these efforts find no support in the law, they are without merit.

Defendant's central premise seems to be that because the trial prosecutor was a knowing participant in the false and misleading testimony of three prosecution witnesses, a new trial is an inadequate remedy, and he is entitled to dismissal on grounds of Double Jeopardy³¹ and due process.³² This position stems from Defendant's misreading of the applicable authorities, and eagerness to avoid the inconvenience of standing trial.

Initially, the People note that Defendant misreads the thrust of the principals underlying Double Jeopardy, and the cases cited on his behalf. Simply put, Double Jeopardy protects a defendant from the prospect of standing trial multiple times for the same offense:³³ thus, a defendant's acquittal will simply end the matter,³⁴ and a trial interrupted against the defendant's wishes in the absence of a "manifest necessity" will preclude retrial.³⁵ This is because the defendant has a legitimate interest in trying his case once—and to a factfinder that he finds acceptable—and

³¹US CONST, Am V; CONST 1963, Art I §15.

As Defendant notes in his brief, federal principals of double jeopardy are currently binding upon the states. *Benton v Maryland*, 395 US 784, 89 S Ct 2056, 23 L Ed 2d 707 (1969). Michigan's rules are essentially identical to those applied nationally by the federal courts. See, *People v Davis*, 472 Mich 156 (2005); *People v Nutt*, 469 Mich 565 (2004).

³²This appears to be the premise of Defendant's third claim as well.

³³See, eg, *Downum v United States*, 372 US 734, 83 S Ct 1033, 10 L Ed 2d 100 (1963);

³⁴See, eg, *Sanabria v United States*, 437 US 54, 98 S Ct 2170, 57 L Ed 2d 43 (1978); *United States v Martin Linen Supply*, 430 US 564, 97 S Ct 1349, 51 L Ed 2d 642 (1977).

³⁵*Downum v United States*, supra; *United States v Dinitz*, 424 US 600, 96 S Ct 1075, 47 L Ed 2d 267 (1976). See, *People v Wilcox*, 183 Mich App 616 (1990).

the Law does not permit the prosecution to avoid application of Double Jeopardy by the expedient of intentionally sabotaging a trial that is going badly for the People, and goading the defense into seeking a mistrial.³⁶ While a defendant's actions in seeking a mistrial ordinarily waive any claim of double jeopardy,³⁷ a mistrial motion prompted by the intentional actions of a prosecutor seeing to abort the trial make the prosecutor the acting party, rather than the defense—and interpose the same jeopardy bar that would arise upon a termination against the defendant's wishes. On the other hand, neither an appellate reversal,³⁸ nor a mistrial following a hung jury,³⁹ will present a jeopardy bar to retrial.

The People have no quarrel with the defense claim that the protection against double jeopardy advances an important interest, or that intentional conduct by the trial prosecutor to provoke a mistrial will result in a jeopardy bar to retrial. This is not, however, the case at bar—where the mistrial was caused by a hung jury, rather than a motion for mistrial, and resulted in a plea of guilty prompted by the collapse of Defendant's case at retrial. And while the errors complained of on appeal—which affected the co-defendant's trial as well—would have resulted in an appellate

³⁶*Oregon v Kennedy*, 456 US 667, 102 S Ct 2083, 72 L Ed 2d 416 (1982); *People v Dawson*, 431 Mich 234, 256-259 (1988).

³⁷*People v Denton*, 402 Mich 47 (1977).

³⁸*Price v Georgia*, 398 US 323, 329 n 4, 90 S Ct 1757, 26 L Ed 2d 300 (1970);

³⁹*Richardson v United States*, 468 US 317, 104 S Ct 3081, 82 L Ed 2d 242 (1984); *People v Thompson*, 424 Mich 118 (1985); *People v Sierb*, 456 Mich 519 (1998); cf. *People v Mehall*, 454 Mich 1 (1997).

On the other hand, though reversal of a verdict that is against the great weight of the evidence poses no bar to a new trial, *Tibbs v Florida*, 457 US 31, 102 S Ct 2211, 72 L Ed 2d 652 (1982), a verdict overturned because the evidence was legally insufficient will. *Burks v Massey*, 437 US 1, 98 S Ct 2141, 57 L Ed 2d 1 (1978); *Green v Massey*, 437 US 19, 98 S Ct 2151, 57 L Ed 2d 15 (1978).

reversal had the first jury returned a guilty verdict,⁴⁰ the law is clear that this type of error would have resulted in a new trial, and not a dismissal.

A typical case is the Court of Appeals decision in *People v Cassell*.⁴¹ In that case, a witness in a drug delivery case testified at trial, specifically denying that he had been an agent for the local police department responsible for narcotics enforcement. In fact, however, he had been engaged as an agent of the police—a fact which was known to the prosecutor at trial, who did nothing to correct the false testimony, and undertook no steps to bring the untruthfulness of the testimony to either the judge or the jury. Tellingly, the prosecutor in that case—as here—treated the testimony as if truthful in closing argument, urging the jury to believe it. On appeal, this Court held that the prosecution had a duty to prevent known lies from being entered into evidence—and that the failure to correct the false testimony entitled the defendant to a new trial.

Also instructive is the Court of Appeals holding in *People v Lester*.⁴² In *Lester*, it was claimed that the prosecutor had knowledge that one of her witnesses had perjured himself on the witness stand. Though noting that the fact was not conclusively proven, this Court nevertheless remanded for an evidentiary hearing to inquire into the prosecutor's state of knowledge. Even so, the Court noted that a new trial was justified “only if the false testimony could in any reasonable likelihood have affected the jury.”⁴³

While Defendant is correct that the precise factual setting of this case—a trial prosecutor's apparently deliberate use of perjured testimony at trial—presents a question of first impression in

⁴⁰In point of fact, the People recognized as much, and confessed error in the co-defendant's trial. See, *People v Pena*, COA #266031.

⁴¹*People v Cassell*, 63 Mich App 226 (1975).

⁴²*People v Lester*, 232 Mich App 262 (1998).

⁴³*People v Lester*, supra at 280.

Michigan, other jurisdictions have confronted similar problems, and apply similar rules. A case in point is the Iowa case of *State v Swartz*.⁴⁴ In *Swartz*, the state appellate courts reversed the defendant's conviction on grounds strikingly similar to the facts of this case: the prosecutor had deliberately used perjured testimony to gain a robbery conviction against the defendant, who sought post-conviction relief on grounds of prosecutorial misconduct.⁴⁵ Before retrial, the defendant moved to dismiss, claiming that Double Jeopardy and due process concerns barred his retrial. The trial court denied his motion, and the defendant sought interlocutory review. On appeal, the Iowa appellate courts rejected the defendant's claims, finding that the new trial would cure any defect in the proceedings, and noting that the right to appeal—and not dismissal for reasons of double jeopardy—were the protections that guarded a defendant's right to a fair trial:

[W]e must be mindful of the underlying protections embodied in the Double Jeopardy Clause. One of its principal aims is to protect the right of defendants to have their trials completed by the first jury empaneled to hear the case. In the event of prosecutorial misconduct during the course of the trial, the defendant must retain primary control over whether to continue with the trial...or request an end to the trial in light of the taint. When this important right is sabotaged by prosecutorial misconduct *intended to provoke the defendant into moving for a mistrial*, a defendant's constitutional right not to be twice placed in jeopardy is violated.

* * *

If it is unnecessary to make the decision to move for a mistrial because the prosecutorial misconduct was not known at the time of trial, the right to have the trial concluded by the first jury is not disturbed, and the defendant's interest in the decision whether or not

⁴⁴*State v Swartz*, 541 NW2d 533 (Iowa App, 1995).

⁴⁵Counsel for the People notes that unlike routine trial error—which is often carelessly described in opinions as “prosecutorial misconduct”—the knowing use of perjured testimony violates the rules of professional conduct, and is actionable in a grievance proceeding. See, MCPR 3.4(b). It is this sort of action—and not the kind of attorney error that arises in the typical case—that should be called “prosecutorial misconduct.”

to take the case from the jury is not impacted....The trial, despite its known or unknown errors, concludes without forcing the defendant to make any decision which impacts the completion of the trial. The right of appeal, not the Double Jeopardy Clause, protects defendants from the underlying errors which may...have rendered the trial unfair. The Double Jeopardy Clause does not serve to protect defendants from prosecutorial misconduct, but to ensure that the defendant gets to choose whether to go to verdict.⁴⁶

As in *Swartz*, the prosecutor in this case appears knowingly to have taken advantage of perjured testimony; unlike *Swartz*, however, she actually informed the trial judge—who, inexplicably, took no remedial action during or after trial. In any event, however, the actions did not affect Defendant’s Double Jeopardy interests in any way: Defendant’s trial was never disrupted, and nothing in the record suggests that the prosecutor’s actions were intended to goad the defense into seeking to abort the proceedings. Rather, as the *Swartz* court noted, under the circumstances of this case it is “inconceivable that a defendant could prove that the prosecutor’s deliberate misconduct was motivated by an intent to [avoid a likely acquittal] instead of an intent simply to prejudice the defendant.”⁴⁷ Accordingly, whatever the consequences may be for the judge and prosecutor,⁴⁸ Defendant’s double jeopardy argument falls on its premise.

Similarly, Defendant’s amorphous “due process” argument finds no support in the law. State law makes it clear that errors by a prosecutor—including possible professional misconduct—are not

⁴⁶*State v Swartz*, supra at 539 (Emphasis added; citations and internal quotations omitted). See also, *Beringer v Sheahan*, 934 F2d 110, 114 (CA 7, 1991) cert den 502 US 1006, 112 S Ct 641, 116 L Ed 2d 658 (1991)(Noting that a defendant who did not move and for and obtain a mistrial cannot invoke jeopardy bar for claim of prosecutorial misconduct). But see, *United States v Wallach*, 979 F2d 912 (CA 2, 1993) cert den 508 US 939, 113 S Ct 2414, 124 L Ed 2d 637 (1993).

⁴⁷*State v Swartz*, supra at 539-540, quoting *Oregon v Kennedy*, supra at 688 (Stevens, J, concurring).

⁴⁸Because the Attorney General is currently litigating a related matter, the People have no comment on what consequences may await in the future.

used to allow a defendant to escape responsibility for his actions, but are treated separately, in an appropriate forum. Thus, in *People v Green*,⁴⁹ this Court refused to suppress an otherwise voluntary statement by the defendant merely because the prosecutor violated professional rules of ethics by speaking to a party represented by counsel without first obtaining counsel's consent: the defendant, on trial for first-degree murder, had contacted the detective in charge of the case expressing a wish to talk to the detective and prosecutor about the case—and specifically indicating a desire to speak without his own attorney present. While noting that such an arrangement violated the rules of professional ethics,⁵⁰ the Court also noted that the defendant's waiver of his rights was proper under the law of confessions. Accordingly, the Court concluded that while the prosecutor might be subject to professional discipline for his actions, nothing in the law required the suppression of the defendant's otherwise voluntary statement.

Also instructive is this Court's decision in *People v Sierb*.⁵¹ In that case, the Court considered a claim of substantive due process, founded on the perceived unfairness of compelling a defendant to stand trial again after multiple acquittals. In rejecting the notion that "substantive due process" provided an alternative to the actual due process protection involved—there, as here, the Double Jeopardy Clause—the Court sounded the death knell for claims that a generalized appeal to "due process" could substitute for the actual constitution. Noting that the United States Supreme Court had deemed "restriction of government authority" to be adequately addressed by the Bill of Rights, Justice Boyle wrote observed that "it is clear that the Court will not rely on substantive due process to sanction new remedies that duplicate the protections of specific constitutional

⁴⁹*People v Green*, 405 Mich 273 (1979).

⁵⁰In 1979, the professional rule involved was DR 7-104(A)(1). Today, the same principle is found in MRPC 4.2.

⁵¹*People v Sierb*, 456 Mich 519 (1998).

provisions.”⁵² Accordingly, the Court held that creating an open-ended remedy for a “general claim of governmental unfairness” would result in the “arbitrary assertion of judicial authority” that was beyond the scope of its legitimate powers.⁵³ Thus, rather than violating the constitutional separation of powers, the Court would confine its remedial actions to those contemplated by the applicable constitutional provisions—and specifically declined to append a “due process annex” to supplement the protections of the Double Jeopardy Clause.

Defendant’s analytical mistake appears to be conflating several constitutional provisions into an amorphous claim that because the police, prosecutor, and initial trial judge blundered, he is entitled to a dismissal. These blunders, however, would have entitled him only to a new trial had he been convicted; he should not receive more favorable treatment, merely because his first trial ended without a verdict for reasons unrelated to any mistakes or misconduct by the prosecutor, judge, or police. And as he chose to resolve the legal case against him through a plea of guilty⁵⁴—and has shown no basis for concluding that his plea was unknowing or involuntary—it is clear that this portion of his argument is without merit.

C. Thoughts in passing.

While the bulk of Defendant’s allegations are unrelated to the actual merits of his appeal and warrant little attention, a few may raise this Court’s eyebrows sufficiently to justify a few words of response. None of them, however, address the point central to the application, which is whether the

⁵²*People v Sierb*, supra at 527.

⁵³*People v Sierb*, supra at 530-531.

⁵⁴Ironically, Defendant decided to accept the prosecutor’s plea offer after his own case imploded—following the disclosure that Defendant had tried to procure an alibi defense through arranging for perjured testimony by an alibi witness. P, 6/7/06, 5-15, 16-29.

error that infected his first trial justify action by this Court to overturn his guilty plea dismiss the case against him. It is clear that an otherwise voluntary guilty plea waives all non-jurisdictional defects—including any constitutional claims that affect the question of factual guilt or innocence.⁵⁵ As Defendant neither cites to his guilty plea, or points to anything which would justify setting it aside, it is clear that this Court lacks a reason to do so.⁵⁶

In any event, it is clear that the entire litany of bungling misadventures involved in this case was known to the trial court, and to Defendant, at the time of his plea. Despite this, Defendant chose to plead guilty to take advantage of the plea offer tendered by the prosecution. Accordingly, whatever effect the earlier blunders would have had in the event of a jury conviction at his first trial⁵⁷ has no bearing on the voluntariness or accuracy of Defendant's plea in this case. And as defense counsel cannot be ineffective for securing the best available deal for his client in the face of uncertainty,⁵⁸ Defendant's contrary claim is without merit.

Lastly, Defendant spends much effort alleging "criminal misconduct" by the judge and prosecutor in this case, and citing to the sealed records in support of his claim. Criminal conspiracies do not, however, ordinarily occur on the record of a court proceeding, and while both the judge and

⁵⁵See, eg, *Menna v New York*, 423 US 61, 96 S Ct 241, 46 L Ed 2d 195 (1975); *United States v Broce*, 488 US 563, 109 S Ct 757, 102 L Ed 2d 927 (1989); *People v New*, 427 Mich 482 (1986).

⁵⁶See, MCR §6.310.

⁵⁷As noted supra, Note 40, upon discovering the problem, the prosecution informed defense counsel for the co-defendant, stipulated in this Court to vacating his conviction, and offered him a favorable plea in the interests of justice. A similar result against Defendant in the first trial would have led to similar relief on appeal.

⁵⁸As this Court noted in *People v Reed*, 449 Mich 375 (1995), counsel is not ineffective for taking a position that seems reasonable at the time, even if it later proves to be incorrect. In the context of this case, this means that trial counsel cannot be faulted for trying to make the best of a bad situation—exacerbated by Defendant's efforts at recruiting an alibi witness to commit perjury—and obtaining the best plea agreement possible under the circumstances.

trial prosecutor exhibited inexcusable lapses of professional judgment—for which they may be answerable—the mere fact that their actions were documented proves that they were acting in good faith: by and large, criminal conspiracies are done in secret, not on the record; and the very attempt to document and preserve their actions for later review suggests that however misguided they may have been, at the time they both believed their actions to be proper. Ockham’s Razor⁵⁹ holds that the simplest explanation is usually the correct one; Napoleon also observed that it is usually a mistake to ascribe to malice that which is also explained by incompetence.⁶⁰ In a world in which human imperfections surround us, we do not need wild accusations to understand that people often blunder, even with the best of intentions.

This Court should reject Defendant’s claim of immunity by governmental bungling, and affirm his plea of guilty.

⁵⁹ “*Pluralitas non est ponenda sine neccesitate*, ” in the original Latin. (Literally: “Entities should not be multiplied unnecessarily.”).

⁶⁰ This is sometimes referred to as Hanlon’s Razor: “Never attribute to malice that which can be adequately explained by stupidity.” Napoleon’s version appears more charitable.

RELIEF

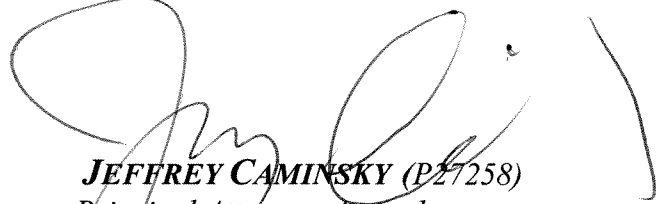
WHEREFORE, this Court should deny affirm Defendant's conviction and sentence below.

KYM L. WORTHY

Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN

Chief of Research, Training, & Appeals

A large, stylized handwritten signature in black ink, likely belonging to Jeffrey Caminsky, is written over the printed name and title.

JEFFREY CAMINSKY (P27258)

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Dated: April 15, 2009

JC/pw

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